

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

No. 77-2103

United States Court of Appeals for the Second Circuit.

LOUIS OSTRER,
PETITIONER, APPELLANT,

v.

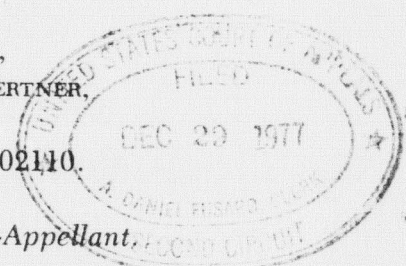
UNITED STATES OF AMERICA,
RESPONDENT, APPELLEE,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Reply Brief of the Petitioner-Appellant.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-2103

LOUIS OSTRER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR PETITIONER-APPELLANT

Introduction.

In its brief, the Government takes a number of liberties with the admittedly long and complex record in this case. The Government also makes several significant concessions which substantially bolster Appellant's case. And, finally, the Government omits a number of salient facts, and it glosses over a very recent decision of this Court that is dispositive of the case at bar.

1. The most dramatic aspect of the Government's brief is an omission -- an utter failure even to attempt to grapple with the dispositive opinion handed down by this Court after the filing of Appellant's brief but before the filing of the Government's

-- in Annunziato v. Manson, Docket No. 77-2017, slip op. (2d Cir., November 21, 1977).^{1/} That opinion undermines both the District Court's analysis of this case in declining to grant Ostrer relief and the Government's analysis of the issues in its brief to this Court.

This Court found a reversible Brady violation where it was discovered post-trial that the key state's witness, one Pino, who at trial had denied that any "deal" had been made for his testimony, later testified in another case that indeed a deal had been made between himself and the state. The District Court found Pino's trial testimony "false, even bordering on perjury", and concluded that "the state should have known of its inaccuracy."^{2/}

This Court noted that only two prosecution witnesses, Pino and Gould, implicated Annunziato. Pino gave "significant testimony." (Slip op. 465-66) Thus -- even though Gould, too, implicated the defendant -- the state's failure to provide defense counsel at trial with impeachment material regarding Pino was

1/

The Government performed its ethical duty in at least citing the Annunziato decision at 14. Thus, the Government was aware of this decision, yet oddly chose to cite it merely with a "see also" preface, rather than to discuss it. Such failure to even attempt to distinguish a decision so closely in point would seem, in this case, to be only a step away from a confession of error. This is especially so in view of the extensive use of the District Court's Annunziato decision made by Appellant in his brief at 51n, 55, 56 and 59n.

2/

United States ex rel. Annunziato v. Manson, 425 F.Supp. 1272, 1278 (D. Conn., February 23, 1977). Judge Blumenfeld's February 23, 1977, decision in the case was reported. His later Supplemental Memorandum of Decision, filed on June 11, 1977, essentially adhered to the prior opinion. That later opinion is not yet reported; a copy is attached to this brief as Addendum A.

reversible error under Giglio and Agurs.^{3/} Relatedly, this Court's Annunziato opinion emphasizes the trial judge's serious error in refusing to allow cross-examination of Pino as to "pending charges in an effort to show bias and interest." (Id. at 467) Indeed, "Pino testified [at trial] that he had made no bargain on his current arrests...." Id.

Ostrer's trial counsel was faced with a very similar refusal by the trial judge to allow cross-examination into the scope of Hellerman's crimes.^{4/} The Government, at 27, makes light of this serious restriction, claiming that Ostrer's trial counsel "emphasized that the Government 'bought' [Hellerman's] testimony" and that Hellerman's "litany of crimes" was revealed to the jury. Professing to find Ostrer's cross-examination complaint "astounding," the Government states that defense counsel was permitted to pursue questions "relating to Hellerman's role in prior criminal acts" and that Ostrer did not complain of any restriction on his direct appeal.^{5/} (Id. at 28)

3/

In the case at bar, as the court below found, and as the Government has not once contested, the testimony of Michael Hellerman was the key, if not the only evidence against Ostrer, and the jury had to have believed Hellerman's testimony in order to return a verdict of guilty. (App. 354, n.4)

4/

See discussion of this problem at 23-24 of Appellant's brief.

5/

It is precisely because of the Government's suppression of evidence that Ostrer's counsel on direct appeal were not aware of the importance of this infringement of cross-examination! Appellant's point now is not simply that the trial judge erred in unduly restricting cross-examination, but that in light of such restriction, which might or might not have been reversible error in other circumstances, the Government's Brady default becomes more serious and prejudicial.

The record (as cited in Appellant's brief at 23-24) is clear. Ostrer's trial counsel was not allowed to probe into any of the details of the crimes for which Hellerman stood accused or convicted.^{6/} The transcript contains the following:

"MR. MCGUIRE: I am not asking Mr. Goldberg or asking the Court to direct Mr. Goldberg to desist from proper cross-examination. Obviously, Mr. Goldberg is entitled to establish the nature of Mr. Hellerman's participation in other crimes. But when it gets to examining the witness about conversations that he had with other participants in those crimes and developing the entire skeleton of each of them as if it were the other crime and not this crime that is on trial here, I say that is too much. I think that it is a matter that is discretionary for Your Honor, but I would like to make my position known on that well in advance.

"MR. GOLDBERG: ...But Your Honor's discretion, most respectfully, ...must be exercised with a mind or a view as to the nature of this kind of witness. This is a key critical witness, where the cross-examiner should be given great latitude.

"THE COURT: Mr. Goldberg, I don't think I have any great problem exercising my discretion in this area, because it appears to me that you have plenty of ammunition, plenty of information, plenty of indictments^{7/} to probe to your heart's content without transgressing the limits of proper cross-examination.

"MR. GOLDBERG: All right Your Honor. I will follow it to the letter."

(App. 715-716).

6/

The reason for the Government's and the trial Court's restrictive view of cross-examination was that Ostrer's trial was only the first of a long series of trials in which Hellerman was to testify, and the prosecutor did not want Ostrer's trial to be used as a means of the other defendants' in future trials "prematurely" obtaining discovery as to the evidence against them. (App. 714-717)

7/

The Natco indictment was not among the "plenty of indictments" supplied to the defense. (App. 322)

Under these limitations, defense counsel could ask only about the name and nature of the swindle and the fact of Hellerman's participation. And an examination of Hellerman as to the mere fact of his participation in the Natco bankruptcy swindle -- the outer limit allowed by the trial judge -- was a completely inadequate device for ferreting out the \$80,000. heist. This crucial aspect of the Natco fraud -- particularly the role of the Government in helping Hellerman win out over his former confederates and steal for himself the \$80,000.-- could not have been uncovered at trial given the strictures placed upon the cross-examination of Hellerman. The Government's brief, at 11, states that appellant "argues that the decision in Giglio remains undisturbed by the subsequent opinion in United States v. Agurs, 427 U.S. 97 (1976)." In Annunziato, this Court so held:

"We think the Agurs test was not meant to weaken the test of Giglio where the prosecution witness falsely denied a leniency agreement and the prosecutor stands by without correcting the record. The rule remains, we think, that, in such case, the conviction must be set aside if there is 'any reasonable likelihood that the false testimony could have affected the judgment of the jury.'"

(Slip op. at 471-472)

Actual perjury is not the sine qua non of a Category I case controlled by Giglio. This Court noted that the District Court in Annunziato found merely that Pino's trial testimony "was false, even bordering on perjury." (Id. at 470) (emphasis supplied) Thus, false or highly misleading testimony, whether or not perjurious, is sufficient to invoke the Giglio principle.

Further, "there is no need to prove a deliberate design to suborn or conceal perjury on the part of the prosecution." (Id. at 471)

The undisputed fact is that Hellerman testified falsely when he claimed that the written agreement embodied all of his understandings with the Government. This testimony misled defense counsel and the jury. Analyzing the situation without the benefit of this Court's guidance in Annunziato, Judge Brieant declined to apply Giglio because there was no evidence that Hellerman did not believe that the written agreement was a complete statement of his deal with the Government.^{8/} Annunziato demonstrates that the District Court's analysis was plainly in error:

8/

Judge Brieant found that Hellerman and his cohort Schustek revealed to the Government "the full story of the Natco swindle, ...thereby making the Government fully aware of the intended goal of Natco's bankruptcy before [the Government] released the \$80,000. to Kurland." (App. 318) Judge Brieant recognized the benefits that the Government realized at the time would accrue to the prosecution by doing this favor for Hellerman: "the Government was aware before it reached its decision to release the funds to an attorney authorized by Schustek, that Hellerman desperately needed this money to pay off loansharks who were threatening his life. Moreover, it was in the Government's interests to leave Hellerman at liberty on an undercover basis as an informant rather than placing him in a safe house. Nor did Hellerman want to go into hiding or flee." (App. 318) Thus, both Hellerman and the Chief recognized what an immense favor was being done for Hellerman by the Government. Judge Brieant's conclusion that Hellerman "took these benefits to be mere largesse, outside his agreement to testify for the Government" (App. 360, n.16), rather than a stated quid pro quo for Hellerman's testimony, is puzzling, since obviously Hellerman realized that his beneficent treatment stemmed from his status as a cooperating witness, and the Chief realized that giving Hellerman the \$80,000. would protect his life and his undercover status, thus enhancing his value as a prosecution witness.

Furthermore, this Court in Annunziato placed particular emphasis on the fact that the suppressed information involved a promise of leniency, effective in the present and the future -- "power that the State could still exert over Pino's freedom." Id. at 469. "[P]ast favors at the hand of the authorities" must be disclosed, but it is even more important to disclose the fact that at the time of the witness' trial testimony, "the prosecution has a present leverage over the fate of the witness." (Id. at 472.)

This is precisely the situation in the case at bar, for the Natco \$80,000. incident gave the Government significant "present leverage" over Hellerman. As the Court below found, mention of the Natco fraud was conspicuously missing from the Memorandum of Agreement. (App. 322) This meant, of course, that Hellerman had no immunity from prosecution for Natco even if he fully lived up to his end of the plea bargain. Moreover, the District Court found that the Chief warned Hellerman, just at the time the Chief turned over the \$80,000. to Attorney Kurland, that if Hellerman used the money for his own personal ends, he would be prosecuted.^{9/} (App. 321) "[P]rior to Ostrer's trial, the Government was aware that Hellerman had actually obtained

9/

Judge Briant noted:

"The Chief's contemporaneous warning to Hellerman and Schustek that they would be prosecuted if they stole this money was obviously a paper tiger, since Hellerman knew full well that if the Government didn't want him to get the money, all it had to do was keep it, or release it to a Natco receiver, its creditors or the bankruptcy court. Hellerman was right. He was never prosecuted for stealing the \$80,000."

(App. 321)

the funds and had used them to pay off the loansharks...."

(App. 321) Having violated the Chief's "paper tiger" of a threat, Hellerman was at the time of Ostrer's trial liable to prosecution for larceny of these funds.^{10/} Thus, a present threat of future prosecution was hanging over Hellerman's head while he testified against Ostrer, and the jury had not the slightest inkling of it.

2. The Appellant has contended that, while Judge Brieant's findings of fact based on the evidentiary hearing are not reviewable by this Court except for manifest abuse of error, his conclusion with respect to the impact of the undisclosed evidence on the jury is not entitled to as much weight, since Judge Brieant did not preside at the original trial; indeed, this Court is in as good a position as Judge Brieant to make that

10/

Presumably Hellerman could have been prosecuted not only for the state crime of larceny, but also for the Federal crimes of bankruptcy fraud (18 U.S.C. §152), the use of the facilities of interstate commerce to perpetrate a fraud (18 U.S.C. §2314), and lying to a Federal officer (18 U.S.C. §1001), at the very least.

The Government entered a nolle prosequi as against Hellerman in the Natco case about ten months after Hellerman's testimony against Ostrer. It apparently was entered with the defendant's consent. Nothing precludes the Government from prosecuting Hellerman now for the \$80,000. theft. See, e.g., Newman v. United States, 410 F.2d 259 (D.C. Cir., 1969), United States v. Martin Linen Supply Co., 485 F.2d 1143 (5th Cir., 1973). Counsel for Ostrer have not heard any rumblings in that direction, however, so Judge Brieant's "paper tiger" characterization of the Chief's warning still stands. Besides, the theft of the \$80,000. constituted several federal crimes in addition to bankruptcy fraud, and bankruptcy fraud was the only charge alleged in the indictment that was nolle prossed. Hellerman had wide-open liability on this theft.

11/
impact evaluation.

The Government, at 18-19 n.*, seemingly concedes that this analysis is quite correct. The Government makes the same point, although for other purposes:

"To the extent that language in the District Court opinion suggests that Judge Brieant believed Dioguardi had made a specific Brady request, we submit that such a determination is incorrect. Moreover, the issue of whether a particular pretrial motion constitutes a specific or general Brady request is a legal as opposed to a factual matter in which this Court need not give any special deference to the conclusion of the District Court. Finally, the sole evidence of any Brady request which inured to Ostrer's benefit is set forth in documents included in the appendix, (A.75) and did not include any testimony.

11/

In examining de novo the record which the District Court had already determined to be such that habeas relief was not warranted, the Fifth Circuit, in Cannon v. State of Alabama, 558 F.2d 1211 (1977), took note of an "ambiguity [in Agurs] concerning in whose mind the omitted evidence must be deemed to create a reasonable doubt." Id. at n.11. The Agurs Court had concluded

"[S]ince after considering [the undisclosed information] in the context of the entire record the trial judge remained convinced of [the defendant's] guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender [the undisclosed information] did not deprive [the defendant] of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment."

Agurs at 2402, cited in Cannon at n.11 (emphasis supplied by Court of Appeals). The reviewing court itself is obligated to decide whether the lower court's analysis of the record is "thorough and entirely reasonable". In Cannon, of course, as in this case, the Court of Appeals was in just as good a position as the District Court which had "adjudicated the case on the basis of the state trial record and the transcript of the state court hearing on Cannon's new trial motion." Id. at 1213 n.1. Cannon concluded that "any [such] analysis [of Cannon's prosecution] could lead to no other conclusion than that the undisclosed information created a reasonable doubt of guilt." Id. In effect, then, the Court of Appeals ruled that the District Court's reading of the record was unreasonable. In this appeal, the Court need make no such ruling, since the heart of the District Court's error is in applying the wrong legal standard.

Accordingly, even if this is viewed as a factual matter, the District Court was in no better position than this Court to evaluate the significance of Dioguardi's request.

Despite this recognition, however, of the primacy of the Court below as finder of fact in weighing live evidence, the Government conveniently forgets its own admonition.^{12/}

Its Brief is replete with "facts", although the Court below, on the basis of live and documentary evidence, has clearly found to the contrary. Thus, the Government goes to considerable lengths to "explain" to this Court that the Government's actions and, in particular, the actions of the Chief were all taken in complete good faith and for pure-hearted, sufficient, proper and lawful reasons. For example, the Government asserts, at 6, that at all times the prosecutors, including the Chief, "were concerned that the Government had no legal right to keep

^{12/}

The Government's argument verges on the ludicrous when its brief states (at 31):

"While...we naturally agree with the District Court's ultimate legal conclusion, we respectfully submit that Judge Brieant's characterization of the Natco and European trip matters as Brady information is incorrect. Since defendant persists in these claims anyway, and, in order to dispel the intimation that the Government deliberately suppressed material it believed was useful to the defendant, we now address this point...."

The Government seems to find it unusual for an appellant to "persist" in advancing in the appellate court the fact findings and arguments which the Court below specifically found to be true! The Court below agreed with defendant that the suppressed material was Brady information. (App. 341) The Court below not only "intimated", along with defendant, but the Court also found that the Government deliberately suppressed some of the Brady material. (App. 322) This is not an "intimation" that either the Government or this Court can now "dispel" without usurping the role of the finder of fact.

[\$80,000. of Natco funds]" and that, by holding the funds, "the Government might be liable to Natco's legitimate creditors...."

But Judge Brieant found on the basis of live and documentary evidence, including the testimony of the Chief himself, that the Chief knew full well what he was doing, knew that the \$80,000. would find its way to Hellerman personally to pay the loansharks (App. 318-319; Exhibit App. 17), and engaged in a subterfuge to hide the Government's complicity.^{13/} Besides, the Government's professed sympathy with the plight of Natco's creditors comes too late, for at a time when the Government could have helped the bankruptcy trustee, it chose instead to cover up the story of how the \$80,000. got to Hellerman, and to hide as well any

13/

The Government pretends to be fooled by the very subterfuge which did not fool the Court below for a single minute. The Government claims, at 6, that the Chief released the money "to an attorney, Edward Kurland, Esq., who claimed to represent the corporation." Judge Brieant, shortly after Kurland appeared on the stand, referred to him sarcastically as a "\$500. lawyer" -- a reference to the fee that Kurland said he got for performing his part in the scenario. And the Court made it clear that Kurland's appearance on the stand was enough to indicate that the man who hired Kurland "found the right man for the job" (App. 1788), and that "The Court knows what kind of a lawyer Mr. Kurland was." (App 1789). The Court below thus makes it clear how ridiculous it was to claim that the Chief believed that Kurland was a legitimate lawyer for the corporation. The Government cites the Court to the letter typed on Kurland's stationery (Exhibit App. 14), without citing the Court to the letter that follows in the Exhibit Appendix, namely a handwritten letter, not even on a corporate letterhead, signed by Stephen Schustek, introducing Kurland as the duly annointed attorney for the corporation "with reference to a check in the amoun of \$80,000.", the "delivery [of which] to [Kurland] in behalf of the corporation is hereby authorized." (Ex. App. 15) A quick glance at this ridiculous instrument, which the Court below characterized sarcastically as "these impressive documents" (App. 317) tells succinctly the true tale of what the Court below termed a "charade". (App. 319)

information about Hellerman himself.^{14/}

Similarly, the Government's claim (Brief at 16, n.1, 33) that the evidence showed that the Chief was serious in threatening Hellerman with prosecution if he stole the Natco funds is belied by Judge Brieant's direct finding to the contrary. (App. 321)

The Government, at 34, contends that it "cannot be expected to psychoanalyze a witness and speculate as to whether the witness believes a benefit has been conferred upon him." But the District Court found that the Chief knew -- he did not have to speculate --

14/

At a hearing held before the Natco bankruptcy judge on March 16, 1971, it was reported that the trustee had learned that "there has been some money recovered by the Federal Bureau of Investigation of some of these substantial transfers..., so we expect there may be a substantial recovery in this case." (Ex. App. 182) At an April 6, 1971 hearing, it was further reported that the United States Attorney had the books of the corporation. (Ex. App. 190) The trustee later reported to the Bankruptcy Court that he had learned that Schustek "absconded with all funds and the books and records...." (Ex. App. 209) On June 9, 1973, the trustee began learning more about what really happened. He filed an affidavit with the court, indicating that an Assistant United States Attorney had intercepted an \$80,000. draft representing corporate funds, that the funds were turned over to Attorney Kurland, and that Schustek thereafter absconded with the money (Ex. App. 218) at a time when, the trustees erroneously believed, "the United States Attorney was...in the process of investigating the acts and conduct of Mr. Schustek...." (Ex. App. 219)

Much later, however -- on June 28, 1976 -- the trustee realized that the creditors had been betrayed by the Government, and he filed a request that the bankruptcy judge issue a subpoena to the United States Attorney, who "has knowledge of the whereabouts of the principals of the debtor which information is required to conclude the Trustee's investigation into the matter." (Ex. App. 222) A subpoena finally had to issue from the Bankruptcy Court ordering the United States Attorney to appear at a deposition. The Government never informed the trustee, of course, of the Government's role in the \$80,000. theft, nor of the whereabouts of Hellerman or Schustek. So much for the Government's concern for the creditors!

that the money would go and did go to Hellerman. (App. 319-21)
The Government then argues that it "simply is not responsible for Hellerman's misuse of the money." (Brief at 34) Yet this is precisely the kind of argument which the Court below rejected in emphatic terms:

"In effect, the Government chose to look the other way. While denying Hellerman's direct request for the money, the Government accorded him the opportunity to gain possession of it indirectly by the charade of having the corporation's 'attorney' demand and receive it for deposit in a corporate bank account. By conscious avoidance the Government thus intentionally eased the way for Hellerman to benefit from its decision to release the \$80,000. in stolen funds to an attorney 'representing' Natco." ^{15/}
(App. 319) (emphasis supplied).

The Government goes on to try to make it appear that by the time of the Ostrer trial, the Government did not know that Hellerman had, through Schustek, stolen the funds. ^{16/} But Judge Brieant found that as early as the time the money was transferred to Kurland, the Chief knew that the funds would "inevitably" end up in Hellerman's pocket. (App. 319) Further-

^{15/}

The Government -- as an entity -- is now apparently "[making] the traditional Navy Officer's claim: 'It didn't happen on my watch, sir,'" just as Judge Brieant predicted! (App. 316)

^{16/}

The Government's brief, at 7, states: "The money was withdrawn from the account and, unbeknown to the Government at the time, used by Hellerman and his co-conspirator Schustek to repay the loansharks. Morvillo could not recall knowing prior to the Ostrer-Dioguardi trial that Hellerman used the \$80,000. to pay back Natco 'loans' borrowed from loansharks. Hellerman did not recall apprising Morvillo of the ultimate disposition of the \$80,000." Cf. the Court's finding that "prior to Ostrer's trial, the Government was aware that Hellerman had actually obtained the funds and used them to pay off the loansharks...." (App. 321).

more, an evidence exhibit out of the Government's own files shows that the Chief had been formally notified of the theft by one of his assistants, on April 26, 1971, long before Ostrer's trial commenced. (Ex. App. 17)

The Government, at 16, claims

"it is utterly inconceivable that Hellerman thought of the release of the \$80,000. of Natco funds in early January 1971, thought that this was a promise or representation by the Government, and then deliberately misled the jury by not raising on his own the \$80,000."

But Hellerman himself wrote

"When we returned from the cruises I found that the \$80,000. that had been in the Bahamas was now waiting for me. Somehow the U.S. Attorney's office had secretly arranged for the release of the money to prevent me from being killed by Sammy Feet."

Wall Street Swindler at 261.

Finally, the Government, at 36, goes so far as to claim to this Court that "the failure to disclose the Natco matter was entirely innocent." But this protestation is hardly congruent with Judge Briant's finding that the Natco caper had been intentionally suppressed.^{17/}

3. The Government, at 33, asserts that the Chief acted not only properly, but in the only manner available, for he had no real options but to turn over the \$80,000. to Attorney Kurland: "Under these circumstances it is difficult to see what else the Government could have done regarding the \$80,000."

17/

Relatedly, the Government, at 36, makes the claim--nowhere supported by the evidence -- that it was "Hellerman's attorneys /who/ neglected to refer explicitly to the Natco matter" in the Memorandum of Agreement.

The Government cannot be serious. The Chief, who obviously was aware (for he had been told) about Natco's present or imminent bankruptcy, could have turned the funds over to the bankruptcy court or to the trustee.^{18/} The Chief could have turned the funds over to a state court or governmental agency charged with responsibility for overseeing the activities of local corporations. The Chief could have sought a Federal Court declaration as to the proper courses to take. The Chief could have held the funds and waited for a demand that they be turned over to legitimate creditors.

Undoubtedly, if the Chief had asked his superior, the United States Attorney, for advice, Mr. Seymour would not have suffered from the same total failure of imagination that marks the Government's brief; surely he would have advised a course other than the one taken by the Chief.

4. The Government presents a strained argument that the Court below erred in concluding that an amply specific Brady request was made in this case to put the Government on notice as to what kind of exculpatory material was demanded by defense counsel.

The Government, at 19, begins with the truism that "the defendant is in the best position to know preliminarily the nature of the evidence that will advance his case," but it fails to note the parallel truism that the Government is in the best position to know of the existence of specific pieces of evidence -- such as the Natco

^{18/}

Judge Brieant suggested that this was one alternative, but that the Government ignored it and "made no effort to ascertain whether Natco was actually then bankrupt (which it was as of January 26, 1971, although Merchandise Plus did not file until March 8, 1971) or whether the intended fraud was sufficiently advanced so that the seized money could be held in the Government's possession as evidence..." (App. 318).

\$80,000., the fee reduction, etc. -- falling within a general exculpatory category that is the subject of a request.

The Government claims that the motion merely "alert^{ed}/ the Government to the obvious -- the defendant wanted information useful in cross-examining Hellerman" (Government's brief at 22.) But the motion was far more specific, calling for, inter alia:

1. A list of all cases investigated or under investigation or about to be investigated by the Government relating solely to conduct of Michael Hellerman;
2. copies of any indictments where he is or was a co-conspirator, accomplice or participant;

4. any other material in the possession of the Government bearing adversely on the credibility, character and reputation of Michael Hellerman; and

5. any other material relating to any matter which defense counsel could properly use in cross-examination to inquire into Hellerman's motive and bias in favor of the Government or expectation of favor from the Government. (emphasis supplied)

The notice function of a specific request is obviously intended to aid the Government in locating in its files the kinds of exculpatory material asked for by the defense. The Government concedes this. (Government's brief at 23) The defense could not have been much more specific without actually knowing about the very material that was suppressed!^{19/} Thus, Ostrer's situation is far stronger than that of Brady himself, who presumably knew that his

^{19/}

If the Government's argument is accepted, trial courts will be deluged with long form Brady motions which contain requests which would otherwise be stricken as scandalous; e.g., "Please state whether the Chief of the Criminal Division engaged in a criminal enterprise with any of the Government's witnesses; if the answer is in the affirmative, please state the nature of the crime, the specific acts undertaken by each participant, ... " etc.

co-defendant had strangled the victim, and who might have suspected that the co-defendant made such a confession to the state's attorney.

5. The Government, at 35, tries to dodge its obligations by claiming that "certain limits do exist in the Giglio rationale that the prosecutor's office is a single entity for Brady purposes, and that all information attributable to one prosecutor is attributable to the one trying the case."

This case is hardly an appropriate one for a limiting of the Giglio principle. Although the trial prosecutor may not have known of the suppressed information, his direct superior -- the Chief -- did. And it was the Chief who was in charge of orchestrating the Government's dealings with Hellerman. The Chief negotiated and signed the Memorandum of Agreement for the United States. The Chief submitted the memorandum to Judge Lasker. The Chief personally appeared in court during the trial and testified in the robing room -- incompletely, as it turned out -- as to the details of the Hellerman plea bargain. (App. 631-646) And it is to the Chief (and two others) that Hellerman dedicated his memoirs out of gratitude for "[keeping] Michael Hellerman alive and [helping] him become a useful citizen again." This is not a situation in which a defendant is complaining that the Government has not supplied him with exculpatory information in the files of some far-off unrelated arm of the "Government" or even one in which a defendant is complaining about not receiving information from another United States Attorney's Office or the Federal Bureau of Investigation.

Cf. United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975). This is a case in which the defendant is complaining -- with every good reason -- of the failure of the supervising prosecutor in his case to disgorge critical information about Government dealings with the star witness against him. Not only did the Government fail to disclose these facts, but the Government -- the Chief -- intentionally suppressed that information. This is the paradigmatic situation for the invocation of the one-Government principle, not for its avoidance.

6. The Government argues, at 11, that the suppressed information would not likely have changed the jury's verdict because "the jury was well acquainted with the Government's lenient treatment of Hellerman, and one more instance of Government largesse would not have been of any significance."

But the trial prosecutor took precisely the contrary position, and it would be unseemly for the Government to be allowed to change its position in this proceeding. At trial, Mr. McGuire reacted heatedly to defense counsel's claim that Hellerman's deal with the Government was so soft on Hellerman that it was unconscionable:

"After all, this witness, who is genuinely, and with good reason, in fear for his life, is now serving a two-year sentence. That is scarcely the kind of contingent payment to a witness which should disturb the Court in supervising the administration of justice."

(App. 728) Mr. McGuire even went on to claim that Hellerman was at the time of Ostrer's trial in an "adversary" relationship with the Government (App. 732) and that he (McGuire) was "probably responsible as much as anybody in the United States Attorney's office for

the fact that he is in jail at the present time." (App. 732)

Furthermore, the Government's claim that the jury was aware of the Government's lenient treatment of Hellerman ignores entirely critical portions of the record. The jury did not have a picture of such leniency at all, as discussed at 21-23 of Appellant's Brief. It is thus not so "inconceivable" for the "additional [suppressed] impeachment material [to] have had any meaningful impact on the jury..."

The Government also argues, at 25, that since Hellerman was at Ostrer's trial, "portrayed as a thoroughly corrupt and venal criminal", the jury would not have been interested in the evidence that was suppressed, including the Natco money and the Swiss trip permission. Yet the truth is quite to the contrary, for the evidence did portray Hellerman as quite venal, and it is precisely for this reason that a jury would certainly have been suspicious of the Government's motives, and of the effects on the witness' testimony, of such lucrative favors as a free-ride in stealing \$80,000., a \$50,000. fee reduction, and a timely trip to Switzerland (home of the numbered bank account). It is upon the venal that such inducements can be expected to have the strongest influence over conduct.

7. The Government makes an intriguing attempt to construct a definition of Brady material which would exclude, inter alia, an \$80,000. payment by the prosecution to a cooperating witness. It seizes upon the Agurs phrase "sufficient significance" as being the talisman for defining the omissions which constitute Brady

violations. Because, in the Government's view, the \$80,000. y-
ment, Swiss trip, and fee reduction were not of "sufficient signi-
ficance" to have denied Ostrer a fair trial, these facts are, thus,
not Brady material. The Government ignores the Agurs Court's
observation that "the significance of an item of evidence can
seldom be predicted accurately until the entire record is complete"
and that, thus, "the prudent prosecutor will resolve doubtful
questions in favor of disclosure." Id. at 2399.^{20/}

The Government's alternative theory -- or rather, alternative
adjective -- for its defining various matters out of the Brady am-
bit is the label "incidental." Because Hellerman and the Govern-
ment did not enter into formal negotiations concerning the \$80,000.
payment and memorialize their eventual meeting of the minds in a
formal writing, the Government's actions in providing Hellerman
with this sum was, at most, a mere "incidental" benefit,^{21/} and not
an inducement which is even covered by the Brady principle. This
effort, like the "significance" ploy, is preposterous.

The Government, at 32, makes the bald statement that "Id."
case has ever characterized as Brady material the type of incidental

20/

It is a bit difficult to imagine why the Government bothered to
intentionally suppress the fact of the \$80,000. payment if it did
not deem the matter "significant". And, in any event, it is for the
defense, at the outset, to determine what materials are "significant"
or useful to its cause. Would the Government really respond to, say,
a pre-trial defense request for information concerning the Chief's
giving Hellerman \$80,000. with a claim that no such information
would be released because the Government deemed it "insignificant"?

21/

Judge Brieant employed this "incidental" theory in declining
to find that the fee reduction which resulted from the Chief's
calling Hellerman's counsel was Brady material. (App. 30)
Appellant has challenged that ruling in this appeal.

benefits inadvertently conferred on a cooperating defendant -- the type of benefits Ostrer claims the Government suppressed." (emphasis supplied) The Government fails to deal with any of the cases which are cited in the appellant's brief which find benefits much more "incidental" and "inadvertent" than an \$80,000. payment to a witness to constitute Brady material and, further, which call for reversals.

For example, the Court of Appeals for the Third Circuit has dealt with a situation in which the United States Attorney's Office had sent letters to various businesses and state agencies stating that Ballente (the key Government witness) had been immunized and had cooperated with the grand jury. United States v. McCrane, 527 F.2d 906, vacated and remanded, ___U.S.___, 96 S.Ct. 3197, on remand, 524 F.2d 204 (3d Cir. 1976). In essence, the correspondence sought to convince the addressees that persons who cooperate with the Government "should not be penalized for telling the truth" and, therefore, not barred from bidding on public and private contracts. 527 F.2d at 910. Some of these letters had been sent at the request of Ballente's counsel, and some at the request of the various addressees. The text of the letters was not clear that the mailing was the result of any explicit understanding between the Government and Ballente or that the Government has given the witness any specific expectation of favor in this regard. "Nevertheless, the Court was unable to exclude

"...the reasonable inference that merely writing the letters in the circumstances here was preferential treatment. Moreover, knowledge of these letters would have opened other obvious avenues of inquiry into the relationship between the witness and the United States Attorney's Office from the onset of the prosecution."

547 F.2d at 206. The aptness of these observations to the instant case is clear. In McCrane, a series of letters was generated for the witness' benefit; in this case, the Government generated \$80,000. -- and more! -- for its witness. Which benefit is more "incidental," "inadvertent" or "significant"? And why does the Government not even make an effort to deal with this case? The Government's default ^{22/}casts real doubt on the integrity of its argument.

8. The Government tries to belittle its misconduct and the impact of the Natco caper by claiming that there was no perversion of the truth finding process here -- only an inadvertent failure by the Government to disclose an altogether unimportant piece of mere impeachment material. ^{23/}

First, impeachment evidence -- especially impeachment of the key Government witness -- certainly bears directly on guilt versus innocence. This is the precise observation made in Napue v. Illinois, 306 U.S. 265, 269 (1959) as it was cited in Giglio: the "reliability of a given witness may well be determinative of guilt or innocence."

Second, the Government is misleading in its allegation, at 17, that Ostrer claims only "that one misleading answer by Hellerman" taints the trial. In fact, the trial is tainted by a course of conduct that can accurately be described, in part, as a joint criminal

^{22/}

Nor does the Court below seek to bolster with citation its conclusions that (a) a favor done for a witness is not discloseable under Brady if it is done as a favor and not as "a negotiated benefit" (App.347), and (b) a benefit like the \$80,000. is allowable because the Government might have had a good motive, such as saving the witness' life and thereby preserving his testimony. (App. 347-8).

^{23/}

If the matter was actually de minimis, why is the Government still struggling to relitigate the facts found by the District Court?

enterprise between the Government and the chief prosecution witness. And the "one misleading answer" to which the Government refers was one which, if it had been made in an entirely forthright manner, would have opened up wholly new and dramatic vistas for cross-examination.

Third, the Government is clearly wrong in its claim, at 17, n.1, that the Government's intentional Brady violation is unimportant because prophylactic considerations are irrelevant under Agurs analysis, and the sole concern is whether the non-disclosure "resulted in the subversion of the truth finding process." To be sure, Brady speaks of its rule being applicable "irrespective of the good faith or bad faith of the prosecution", but government misconduct is clearly a factor in Category I cases, such as this one. The Agurs opinion, at 2397, recognizes this when it distinguishes the Mooney line of Category I cases from Agurs itself which "involve /d/ no misconduct..." The Agurs opinion also observes that Category I's strict standard of materiality is appropriate because those cases "involve prosecutorial misconduct..." Id. This misconduct is, of course, in the Government's knowing the true facts but standing by while a false or misleading version of those facts is presented to the fact-finder, and failing to disclose the truth to the defense and/or the jury. Thus, the misconduct itself results in the "corruption of the truth seeking function of the trial process" (Id.) and prophylactic considerations are fully appropriate.

Just such a subversion of the trial process characterizes this prosecution. The Government argues that Hellerman was already dis-

credited in the jury's eyes, and so the additional impeachment evidence would not have mattered. The additional matters, claims the Government at 24, "were trivial compared to the substantial impeachment material brought out at the trial."

The Government in this case is peddling the precise "disingenuous argument" which the Fifth Circuit recently commended the government for not making in Cannon v. State of Alabama, supra. In essence, that argument is that, in a prosecution in which the Government's proofs are not wholly overwhelming or even weak, "any reasonable doubt already existed" and, as a result, another reasonable doubt should make no difference. In Cannon, the prosecution failed to inform the defense of a witness who had positively identified the assailant as someone other than Cannon. ^{24/} The Court reversed the District Court's refusal to issue the writ, observing that the state's case was a weak one and that this new evidence "undoubtedly" created a reasonable doubt that did not otherwise exist. Id. at 1216.

"While it is true that the jury convicted Cannon despite weak evidence we will not assume that the jury would also have convicted on the weaker showing that would have been present /if the suppressed witness had/ testified. /her testimony/ did not merely track that of the other witnesses; she alone could have provided the /assailant's/ identity."

Id. at n. 9.

The Government's position in this case is right along the lines of the argument that the State did not have the chutzpah to make in Cannon. And it is at war with the principle that "if the verdict is

^{24/}

There was no specific request for this information. Cannon is, thus, a Category III case under the Agurs analysis.

already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." Agurs at 113, cited in Annunziato at 471. Essentially, that argument is that Michael Hellerman was shown -- and admitted to be -- "one of the rottenest creatures you have ever run across" (App.1171) and "scum." (App. 1174)^{25/} Nevertheless, the jury -- which deliberated for a full three days -- finally decided to believe him in part and, therefore, what difference could it possibly make if Hellerman were involved in yet another of a multitude of transgressions, even if he were in cahoots with the Government in this particular illicit deal? This new information is merely "cumulative" and its non-disclosure harmless error.

If this line of argument is accepted, the first lesson will be that the "rottener" the Government witness, the less fastidious the Government need be in meeting its Brady obligations. And such a rule would clearly encourage the sort of disarray in the United States Attorneys' offices which this Court has previously served notice that it intended to correct.^{26/}

25/

Once Hellerman had been converted to a "cooperating witness", his rotten, scummy days were, of course, behind him -- according to the Government's trial presentation. But the suppressed evidence on Natco concerned a crime committed after Hellerman's touted conversion and committed in cooperation with the Government -- the Chief himself.^{26/}

In his concurring and dissenting opinion in United States v. Morrell, 524 F.2d 550 (1975) Judge Friendly issued a hortatory call to the United States Attorney's office to put its house in order: "It is high time that the United States Attorneys in this Circuit took effective means to heed the Chief Justice's admonition in Giglio ...at 766, that, to the extent that requiring the right hand to know what the left hand is doing 'places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to each lawyer who deals with it.' This should be particularly easy when, as in this case and many others, the material concerns the prosecution's chief witness."

In addition to its "disingenuousness," this analysis reflects a rather profound confusion concerning the scope of the role of the harmless error rule. The rule is invoked in cases where other, independent evidence of guilt is overwhelming, but certainly not in cases where the Government's witness is on the verge of being disbelieved and where the Government has no case without him.

The Government's jumbling of the principles is highlighted in the footnote at page 24 of its brief:

"In evaluating the omitted evidence's possible impact on the jury's verdict, this Court should not overlook the fact that none of the evidence directly or even indirectly exculpates Ostrer."

^{27/}
This statement is quite simply false, and extraordinarily misleading. It is intended, no doubt, to discredit the defendant and also perhaps to assuage to some degree this Court's rightful indignation at the Government's shocking conduct in the preparation and trial of the Ostrer case. The fact is that only Hellerman's testimony made Ostrer into a criminal. The Court below so found. (App. 354, n.4.) All of Ostrer's actions were subject to a perfectly innocent explanation -- that is to say, he purchased stock on a tip, without any knowledge of a manipulation. The question of whether or not Ostrer knew of the manipulation was the only question of fact to be resolved by the jury.

Aside from his own denials, there was no way for Ostrer to produce evidence of his lack of knowledge. It would not have availed Ostrer to have produced a hundred witnesses who were present with

^{27/}

The Government again makes this claim at 34 of its brief -- that none of the suppressed evidence "had anything at all to do with Ostrer's innocence."

Ostrer and Hellerman who would testify that Hellerman did not tell Ostrer of the manipulation, for Hellerman and the Government could have claimed that this critical information about the manipulation was passed along to Ostrer by Hellerman while the two were alone one day. Thus, in the absence of testimony by Ostrer -- which he had an absolute privilege not to give ^{28/} -- the only proof of Ostrer's innocence would be proof that Hellerman was lying. While this might technically be seen as "impeachment evidence", it is in fact the only kind of exculpatory evidence possible in a case like this. The Government's Brady defaults in this case go directly to the issue of guilt versus innocence.

This Court's Annunziato opinion speaks to this issue. At trial Pino "had admitted previous convictions", he admitted that at one point "he was hoping for leniency", and he testified that he had previously received a suspended sentence. (Slip op. at 468) But this Court cited, with evident approval, the view of the District Court, "relying on Davis v. Alaska, 415 U.S. 308, 318 (1974), that the denial of the 'right to effective cross-examination...would be constitutional error of the first magnitude and no amount of showing of want of prejudice could cure it'", that the suppression of the plea bargain was not made harmless simply because other impeachment evidence had been disclosed or admitted. (Slip op. at 468)

28/

Ostrer decided not to testify because he had a prior state conviction for misapplication of the funds of an insurance company, and he failed to obtain a jury-waive trial (in which event he would have testified) because his co-defendant would not join in his waiver, and the trial judge refused to grant a severance. (App. 225)

The case at bar, then, presents a much more compelling situation than even Annunziato, since here Hellerman's testimony was the only evidence against Ostrer, whereas in Annunziato there was other independent evidence. Furthermore, the suppressed information in Annunziato -- that the witness had received a promise from a police officer that his testimony would earn him leniency -- while grist for argument, would certainly be far less shocking to a jury than the Natco disclosures. People are accustomed to plea bargaining, but they are not inured to Government participation with witnesses in larceny and fraud.

9. In an argument which ironically serves only to highlight one of the Government's most egregious misdeeds during the course of its dealings with Hellerman and the lengths to which it had to go to keep him "cooperative" and keep others ignorant of how far it was willing to go to keep him in this state, the Government states that because the Natco indictment and the memorandum to Judge Lasker "did not mention the release of the \$80,000. to a Natco attorney, or the subsequent embezzlement of that money by Hellerman" (Government's brief at 39), Ostrer should not complain about not receiving the documents since they would not have provided the particular nugget of information which so interests him.

But these documents might have at least given Ostrer a clue, and with an opportunity to fully cross-examine Hellerman, he might have ferreted out the truth. But the Government was so intent on burying the \$80,000. caper that it could not afford to let out even a clue. It went so far as to commit a fraud upon the Court, that

is, Judge Lasker, the Judge with the unenviable responsibility of fashioning a just sentence to impose on Michael Hellerman.

The text of the Chief's memorandum to the Court indicates that it was submitted upon Judge Lasker's request that he be provided with information concerning Hellerman's involvement in various frauds and his cooperation with the United States Attorney's Office. (Ex. App. 4) The description of Hellerman's involvement in Natco goes heavy on the cooperation and light on the fraud:

During the Fall of 1970 /writes the Chief/,

"Hellerman also alerted this office to a bankruptcy fraud then in progress which resulted in the indictment of Samuel Falgiano and others. Your Honor will recall the facts from having presided over this trial. At the time Hellerman came to us with this information we had absolutely no knowledge of this fraud. Hellerman was instrumental in persuading Steven Schustek to become a government witness and kept this office closely advised of the final stages of the fraud. Because of Hellerman's information we were able to prevent Falgiano and others from cashing the \$100,000. of corporate checks at the gambling casinos." (emphasis supplied)

What the Chief's memorandum to Judge Lasker fails to mention is that Hellerman was keeping the Government "closely advised of the final stages of the fraud" because he desperately needed the Government's assistance in obtaining the final "bust-out" payoff. Nor is there a whiff in this communication to the Court about what happened after the Government "prevented Falgiano and others from cashing the \$100,000. of corporate checks at the gambling casinos": The Government funneled the money to Hellerman!

This gross misrepresentation of the true facts of Hellerman's (and, of course, the Government's) role in the final Natco "bust-out" can be seen as yet another favor which the Government bestowed upon

Hellerman; it went so far as to grossly misrepresent Hellerman's criminal activities to the Court which would sentence him by portraying him as a good-citizen "cooperator" when he was simply continuing his career as a thief with the Government's active assistance.

10. The Government glosses too lightly over the record with respect to what it characterizes as "the juror competency issue". (Government's brief at 40) In fact, this issue, in light of the affidavits filed by the Appellant, goes considerably beyond the mere question of the juror's competence, and strikes as well at the question of whether this juror, incompetent as she appears to have been, fell under the influence of two friends with whom she discussed the case prior to the commencement of jury deliberations, and who told her to vote for conviction for reasons that were entirely unlawful.

The Government states in its brief, at 42, that "the initial affidavit from Junius Rush adds no new information to his sister's earlier letter." Yet a brief glance at that affidavit indicates that it delves into an area not touched upon before in this case -- the improper influence upon juror Rush exercised by two of her friends, who had an opportunity to so influence her because she disobeyed the trial judge's repeated orders not to discuss the case with extrinsic persons.

As for the Government's claim that an evidentiary hearing into Appellant's allegations would necessarily "have to probe the juror's mind" (Government's brief at 44), it is clear that probing into the

question of whom juror Rush met during the trial and what she discussed with them, does not entail any such intrusion. Once we learn at such an evidentiary hearing that she discussed Ostrer with her friends, and that they told her to convict him for improper reasons, the inquiry is at an end.

The Government claims, at 44, that the second Junius Rush affidavit -- the one submitted by the Government -- "repudiates much of his initial affidavit." The error of this argument is easily discerned by examining carefully the first Rush affidavit (App. 219-222) and the second affidavit (App. 223).

The second Rush affidavit, for example, confirms the statement in the first affidavit that juror Rush did indeed discuss the trial, while it was in progress, with two of her friends. It also confirms the doubt that juror Rush had as to the correctness of her verdict, for she asked her brother if she made a mistake. (App. 223) The second affidavit does not contradict the statements in the first affidavit to the effect that during the trial, juror Rush was under the influence of spiritualists and that she believed that she had what are evidently extrasensory powers to ascertain the unknown through such powers (rather than through, for example, evidence presented in a courtroom). There is evidence that she exhibited paranoid suspicions. The second affidavit does not deny the statement in the first that the juror's friend stated that the defendants were guilty, or that juror Rush said "I saw something in my eyes to indicate they are guilty." (App. 221) Most important of all, the second affidavit does not contradict the first affidavit's claim that

the juror's friend told her that she had better not vote for acquittal. (App. 222)

Clearly, the uncontradicted portions of the first Junius Rush affidavit raise substantial questions not only as to the juror's competence, but also as to improper extrinsic interference with the juror's function. The Government nevertheless seeks both to minimize this critical situation and to claim that it was raised in earlier proceedings. Of course, the Government can present no citations to any record or court opinion or brief wherein the issue of outside interference by a friend with the juror's function was so much as mentioned.

The fact is that the affidavits of Junius Rush indicate that the juror here was disturbed in two ways -- mentally, and by interference from her friend. At the very least, an evidentiary hearing was required.

Conclusion

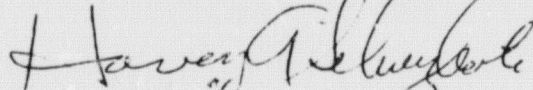
For the foregoing reasons, and for the reasons stated in Appellant's main brief, the order of the Court below denying Appellant's prayer to vacate the judgment and conviction should be reversed, and the relief should be granted. In the alternative, an evidentiary hearing should be ordered on the issue of juror incompetency and undue improper and unlawful extrinsic influence over the juror's deliberations.

Respectfully,



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ADDENDUM A

SUPPLEMENTAL MEMORANDUM OF DECISION
Filed June 11, 1977

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
JUL 11 2 30 PM '77
U.S. DISTRICT COURT
HARTFORD, CONNECTICUT

UNITED STATES EX REL.
SALVATORE ANNUNZIATO

:

v.

:

CIVIL NO. H-75-387

JOHN R. MANSON, COMMISSIONER

:

SUPPLEMENTAL MEMORANDUM OF DECISION

In a prior opinion, this court concluded that the petitioner had been denied his right to a fair trial as a result of the prosecution's failure to disclose impeachment evidence relative to an extensive offer of immunity to a key witness, Bruce Pino, and because of the trial court's restrictions on the cross-examination of two prosecution witnesses as to pending charges. United States ex rel. Annunziato v. Manson, 425 F. Supp. 1272 (D. Conn. 1977). The court ordered that a writ of habeas corpus should issue unless the state accorded the petitioner a new trial within 60 days. Subsequently, an appeal was taken. In an order dated April 21, 1977, the Court of Appeals permitted the state to withdraw its appeal without prejudice so that it might make a motion to reopen the habeas corpus proceeding in this court and present additional evidence. Annunziato v. Manson, Docket No. 77-2017 (2d Cir. April 21, 1977).

By consent of the parties, the case was originally tried to this court on the record made in the state court habeas

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action. Annunziato v. Manson, Docket No. 25,827 (Superior Ct. Litchfield Cnty. July 7, 1976). Before Superior Court Judge Martin, respondent entered into a stipulation concerning the accuracy of Pino's account of his agreement with the state. In a criminal case subsequent to petitioner's, Pino had admitted complicity in a shooting, a conspiracy to commit murder, a fire bombing and bank burglary. State v. Porto, Docket No. 16,974 (Superior Ct. New Haven Cnty. 1972). He testified that in return for giving evidence against petitioner and others, he was promised that he would receive immunity from prosecution on these crimes, that he would not serve any prison time on two pending narcotics charges, and that he would be given police protection if necessary. At petitioner's trial, in response to the questioning of the Assistant State's Attorney, Pino denied that he had been promised leniency as an inducement to testify. See United States ex rel. Annunziato v. Manson, supra, 425 F. Supp. at 1277-79.

In its additional evidence, the state asserts for the first time that neither State's Attorney Markle nor Assistant State's Attorney Dennis Gaffney, who actually handled Annunziato's prosecution, were aware of or party to any promises of leniency made to Pino. As elicited at a pre-hearing conference and as reflected in the testimony presented, respondent does not challenge the terms of the agreement as recounted by Pino or that such a deal was in fact negotiated with Pino by Stephen Ahearn, Chief Inspector of the Plainclothes Division

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of the New Haven Police Department. The new evidence was directed solely at the awareness of the members of the State's Attorney's Office of this deal and to the claim that petitioner's conviction had been procured through testimony the prosecution knew or should have known was false.^{1/} On June 7, 1977, a hearing was held to allow respondent to present such additional evidence it thought relevant. At that hearing, the state revealed that it was unable to locate its internal file on Annunziato's prosecution. Mr. Pino was not available to testify.^{2/}

1/

The state contends that if no lawyer in the State's Attorney's Office knew of the deal, then any charge of prosecutorial misconduct is inappropriate and that the materiality of the non-disclosed evidence should be measured only by the lesser standard of materiality delineated in Agurs v. United States, 427 U.S. 97, 112-13 (1976). Petitioner would thus be entitled to a new trial only if the omitted evidence would have created a reasonable doubt as to his guilt in the context of the entire record. But in this case, the respondent acknowledges that Ahearn was its agent and that he played a substantial role in Annunziato's prosecution. It is arguable that based solely on this agency relationship, Ahearn's actions could be attributed to the prosecutor's office within the meaning of Giglio v. United States, 405 U.S. 150, 154 (1972), and Napue v. Illinois, 360 U.S. 264, 271 (1959), so that a new trial would be required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." See Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976), cert. denied, 45 U.S.L.W. 3664 (U.S. April 4, 1977); United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971); Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964); Lemire v. Helgemoe, Civ. No. 76-358 (D.N.H. March 23, 1977), 21 Crim. L. Rep. 2006 (April 6, 1977). Because I find that some member of the State's Attorney's Office was aware of the agreement, I need not consider this point.

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Respondent also now asserts that Pino was not available as a witness at the time of the state court habeas hearing. This bald assertion, which has absolutely no support in the record, contradicts the repeated representations of petitioner's counsel. These representations were made at the pre-hearing

The most credible testimony presented to the court was that of Mr. Ahearn. He acknowledged that he had promised Pino immunity from prosecution if Pino became a state's witness. While he could not recall with which assistant he had spoken, Mr. Ahearn was emphatic in stating that he had received authorization to enter into the deal from Mr. Markle or some other member of the State's Attorney's Office. Ahearn's account of the agreement is consistent with prosecutorial practices in New Haven during the 1960's and early 1970's as described by all the witnesses. To a degree, his testimony stands uncontradicted since only two members of the State's Attorney's Office gave evidence at the hearing. During the late 1960's and early 1970's, Ahearn, as Chief Inspector of the Plainclothes Division, was in charge of the investigation of most major crimes. He was the city's chief link with the federal authorities, particularly the F.B.I. With the authorization of the State's Attorney's Office, Mr. Ahearn on several

2/ cont'd

conference and on the record before this court without any objection from the state. (Transcript at 35). This court and the Court of Appeals have now given the state every opportunity to present any evidence it wished in the proceedings. It is a little late in the game for the respondent to affirmatively state that Pino was not available to appear before Judge Martin.

The point is a small one but it highlights the apparent unwillingness of the state to focus in a timely and coherent fashion on the factual and legal issues in this dispute. For example, it was only on the invitation of this court that the state filed a brief on the significance of Agurs v. United States, supra, to the litigation, although the decision in many ways favored the prosecution.

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occasions had made such promises of immunity to persons known to have committed crimes in order to obtain their testimony against others accused of more serious offenses. The deal with Pino seems only one of a series of roughly contemporaneous agreements that Ahearn made with the approval of the State's Attorney's Office to gain prosecution testimony of underworld figures.

Mr. Markle testified that he had no recall of authorizing Ahearn to enter into such a deal with Pino. He was clear, though, that any of his assistants within the office had the power to approve these agreements. Mr. Gaffney denied any knowledge of any promise or deal of leniency toward Pino. But Gaffney's credibility, or at least his ability to recollect the circumstances of the Annunziato trial, was severely undermined on cross-examination and the questioning of this court. On the witness stand, Mr. Gaffney revealed for the first time in the six-year history of this prosecution that he had in fact made certain promises to Pino as an inducement to his testifying for the state.^{3/} As noted in my earlier opinion, Pino was the subject of two narcotics charges

3/

While Mr. Gaffney disputed the use of the words "promise" or "agreement" to describe his arrangement with Pino, it is difficult to choose more appropriate terms. By promising to speak on Pino's behalf, Gaffney offered him something which he knew to be of value to the witness and which can only be characterized as an inducement or reward for his testimony.

Because I conclude that someone within the State's Attorney's Office was aware of the more extensive deal Pino had made with Ahearn, I need not decide if these new promises

pending in the state court when he testified in State v. Annunziato. Mr. Gaffney indicated that he had represented to Pino that he, Gaffney, would make known to the sentencing judge in Pino's cases his cooperation in the Annunziato matter. This would be done either by bringing Pino before the same judge who heard the Annunziato case or, if that judge was unavailable, by affirmative statements to the sentencing judge detailing Pino's aid to the prosecution. Mr. Gaffney then testified that he believed that this arrangement had been disclosed to defense counsel and presented to the jury during petitioner's trial. But of course, one of this court's reasons for granting petitioner habeas relief was that the trial court had sustained Mr. Gaffney's repeated objections to any mention before the jury of these pending charges. United States ex rel. Annunziato v. Manson, supra, 425 F. Supp. at 1275-77.

3/ cont'd

of leniency recounted by Mr. Gaffney would be sufficient to invoke Napue v. Illinois, supra, and Giglio v. United States, supra, given Gaffney's own later questioning of the witness:

"Q: Did anyone ever make a promise for your testimony?

"A: No.

"Q: Has anyone ever made a deal to you or with you?

"A: No."

State v. Annunziato, Docket No. 16,800 (Superior Ct. New Haven Cnty.), Trial Transcript at 873-74. I point out, though, that even on Mr. Gaffney's version of the agreement, the facts and explanations of the prosecutor begin to resemble those in United States ex rel. Washington v. Vincent, 525 F.2d 262 (2d Cir. 1975).

In no way was the jury aware that Pino had any charges pending against him or that the state had agreed not to initiate prosecutions for certain of his crimes.

Moreover, it borders on the incredible that Mr. Gaffney was unaware that Pino had made some agreement with the state. Here was a man who, in addition to two pending narcotics charges, had confessed to an attempted murder and an arson. These were offenses well within Mr. Gaffney's prosecutorial bailiwick for which Pino had not been charged at the time of Annunziato's case. Yet Gaffney maintains he had no knowledge that Pino might have entered into an agreement with respect to these crimes.

Even so, the point is not whether either Mr. Markle or Mr. Gaffney knew of Pino's extensive deal for immunity. This court has no reason to question the integrity of the Chief State's Attorney. But the good faith or bad faith of the prosecution is not material here. Brady v. Maryland, 373 U.S. 83, 87 (1963). Based on Chief Inspector Ahearn's testimony, I find that some prosecutor in the State's Attorney's Office knew of, authorized and approved the agreement negotiated between Ahearn and Pino, a deal which was not disclosed to the defense or to the jury at the Annunziato trial. As the Supreme Court noted in Giglio v. United States, 405 U.S. 150, 154 (1972):

"[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of

the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it."

The case against Annunziato was not a strong one, and Pino's credibility was bitterly contested. The nondisclosed promises of immunity demonstrated a strong interest on Pino's part to testify in a manner favorable to the government. I think it plain that the concealment of the deal could have affected the judgment of the jury.^{4/} United States v. Agurs, 427 U.S. 97, 103 (1976); Giglio v. United States, supra, 405 U.S. at 154.

Finally, it must be noted that certain facts cannot be disputed on the record before the court. A deal was made between some official of the state and the witness. This witness was crucial to the prosecution's case. Pino has never been brought to trial for either the attempted murder or the arson. The pending narcotics charges against him were nolled. The state has lost its own internal file in the Annunziato matter. Respondent did enter into a stipulation concerning

^{4/} Indeed respondent concedes that if Giglio v. United States, supra, sets forth the appropriate standard of materiality, there can be little doubt that petitioner's conviction must be set aside. Respondent's Memorandum of Law Re: Additional Evidence Presented to Court on Brady Issue at 13.

the deal with Pino before Judge Martin during the state habeas proceeding.^{5/} While that stipulation may be ambiguous as to

5/

The stipulation made before Judge Martin is set out in full below:

"By Mr. JACOBS. May it please the court, with respect to Exhibit 'C', the transcript of the testimony of Bruno Pino in the case of Albert Porto which occurred after the trial of the Annunziato case, we have stipulated with the -- with Mr. Diette representing the State's Attorney as follows:

That the testimony of Mr. Pino as contained in that transcript with respect to the agreement that he reached with the State's Attorney's office in New Haven for favorable treatment is, in fact, true; and that he, in fact, prior to his testimony in the Annunziato case, had agreed with the State's Attorney's office in New Haven and they had agreed with him to give him favorable treatment, among other things for his testimony in the case of State vs. Salvatore Annunziato, being file #16,800, in the Superior Court at New Haven County.

I -- The Court Reporter calls my attention to something I should, perhaps, clarify for the record. There were two individuals on trial, at the same time, in the -- along with Salvatore Annunziato. Salvatore's case was 16,800. There was State vs. Francesco Annunziato, 16,795. That's the reason that both numbers appear on the transcript, and the only case, of course, that we are here on, today, is the -- has to do with the case against Salvatore and which is 16,800.

I have asked the Court Reporter to just read me back my last statement to make sure I had covered the points in question.

"The COURT. All right.

(The Reporter read the indicated material.)

"By Mr. JACOBS. Yes. I would like to add to that, when I talked about the agreement by the State's Attorney's office for New Haven County to

the terms of the agreement at issue, it is quite clear in stating that the agreement was reached with "the State's Attorney's Office." Moreover, as Mr. Markle readily acknowledged before this court, he authorized counsel to make such stipulations. The main purpose of the stipulation was to avoid the need for Mr. Markle's own testimony before Judge Martin. Respondent then was always aware that Pino claimed an agreement with the State's Attorney's Office, Giglio v. United States, supra, and the allegation of prosecutorial misconduct or negligence was consistently a factor in these habeas proceedings.^{6/} I thus find unconvincing the state's belated

5/ cont'd

give favorable treatment to Bruno Pino, I referred to favorable treatment on the charges then pending against him in the Superior Court for New Haven County that are set forth in Exhibit #1 on, Exhibits that we have offered here, the possession of drug charges and the second offender charges which were, in fact, nolle after the -- sometime after the Annunziato case was tried.

If I correctly [sic] stated, I would rather stand corrected.

"By Mr. DIETTE. I would say, basically, yes sir." (Emphasis supplied).

Transcript, Annunziato v. Manson, supra, at 5-6. Appendix to Petitioner's Amended Petition For Writ of Habeas Corpus.

6/

As noted in my prior opinion, petitioner contended from the start that the state's repeated and successful objections to evidence concerning the pending narcotics charges against Pino precluded the defense from revealing the deal, seriously misled the jury as to Pino's bias and interest, and therefore constituted false evidence of which the prosecutor knew or should have known. United States ex rel. Annunziato v. Manson, supra, 425 F. Supp. at 1278.

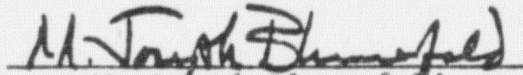
- 11 -

assertion that no attorney in the prosecutor's office had any knowledge of the promises of leniency made to Pino.^{7/}

The case is now one of second impression for me. It has involved troublesome issues in a difficult and uncertain area of the law. However, the additional evidence offered by the state only reinforces my earlier conviction that petitioner's trial did not comport with the due process standards of Giglio v. United States, supra, and Agurs v. United States, supra. I adhere in full to my prior opinion and judgment.

SO ORDERED.

Dated at Hartford, Connecticut, this 11th day of July, 1977.


M. Joseph Blumenfeld
United States District Judge

^{7/}

The state also argues that any improper conduct on its part is mitigated by the fact that petitioner's counsel, Mr. Jacobs, was already aware of Pino's sordid background. There is nothing in the record to demonstrate that Mr. Jacobs knew that Pino had actually received an offer of immunity from the state. What the record does reflect is a professional, though frustrated, effort by Mr. Jacobs to show that Pino had committed serious crimes and that he hoped to gain leniency on these offenses by becoming a witness for the state. See United States ex rel. Washington v. Vincent, supra.

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CERTIFICATE OF SERVICE

Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, NY 10007

Date: December 28, 1977

Dear sir,

Herewith are 10 copies of the reply brief
for:

Appellant

No. 77-2103

LOUIS OSTRER

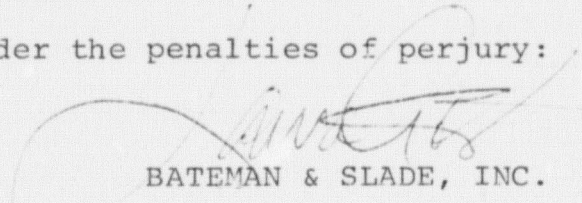
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UNITED STATES OF AMERICA

We certify that we have served two copies
upon opposing counsel, by hand, addressed as
follows:

Richard G. Weinberg, Esq., Assistant United
States Attorney, One St. Andrew's Plaza,
New York, NY 10007

Signed under the penalties of perjury:


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cc. Alan Dershowitz, Esq.; Ann L. Greenblatt, Esq.